

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

WESLEY DOYLE PAYNE,

Plaintiff,

V.

WYETH PHARMACEUTICALS INC.

Defendant.

Civil No. 2:08cv119

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE
NONRESPONSIVE DEPOSITION TESTIMONY OF DR. GREGORY O'SHANICK

COMES NOW the Defendant, Wyeth Pharmaceuticals Inc., by counsel, and moves, pursuant to Rule 26 and Rule 33 of the Federal Rules of Civil Procedure as well as the Federal Rules of Evidence, to strike certain nonresponsive, advocacy answers provided by Dr. Gregory O'Shanick in his deposition.

ARGUMENT

1. Gregory O'Shanick, M.D. is a noted plaintiff's expert. He testified in his deposition in this case that he has not testified on behalf of a defendant since 1997. He has testified in hundreds of personal injury cases. He has testified on behalf of this plaintiff's law firm in at least several dozen cases.

2. Plaintiff's expert O'Shanick was deposed on September 15, 2008. Throughout his deposition, Dr. O'Shanick insisted on inserting nonresponsive, advocacy answers to very specific

questions. Defendant's counsel timely moved to strike the nonresponsive portion of those answers.

3. Attached to this Memorandum is Exhibit A. Exhibit A identifies Dr. O'Shanick's nonresponsive answers.

4. "The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence[.]" Fed. R. Civ. P. 30(c)(1). Fed. R. Evid. 611(a) addresses the Court's ability to control the mode and order of interrogating witnesses. The Rule supplies authority for striking examination testimony where the witness is non-responsive. See 28 Wright and Gold, Federal Practice & Procedure § 6161, at 347, 350 (1993 and Supp. 2008).

5. Federal courts recognize that deponents are not free to advocate in depositions and provide nonresponsive answers to specific questions. The proper remedy for this misconduct is to strike the nonresponsive portions of the answer. See United States v. Piatz, 172 F.3d 54 (7th Cir. 1999) (the answer was stricken as nonresponsive and the appeals court held no error); Frost v. Teco Barge Line, Inc., 2007 U.S. Dist. Lexis 8097 (S.D. Ill. Feb. 5, 2007) (addressing motion *in limine* to strike several non-responsive answers from an occupational expert's deposition testimony); Foster v United States, 145 F.2d 873, 877 (8th Cir. 1944); Moore v Moore, 47 App. D.C. 18, 21 (D.C. 1917).

6. In order to effectively and succinctly cross-examine Dr. O'Shanick, Defendant respectfully requests that nonresponsive portions of his deposition be stricken. To the extent Dr. O'Shanick is cross-examined or impeached with his prior deposition answers, the Court should preclude Dr. O'Shanick or Plaintiff's counsel from identifying or reciting nonresponsive portions of his answers to the jury.

Respectfully submitted,

WYETH PHARMACEUTICALS INC.

By: _____/s/_____
Of Counsel

Robert F. Redmond, Jr., Esq. (VSB # 32292)

rredmond@williamsmullen.com

Robert H. Burger, Esq. (VSB # 43893)

rburger@williamsmullen.com

Brendan D. O'Toole, Esq. (VSB # 71329)

botoole@williamsmullen.com

Williams Mullen

Two James Center

1021 East Cary Street

P.O. Box 1320

Richmond, VA 23218-1320

Phone: (804) 783-6439

Fax: (804) 783-6507

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2008, a true and accurate copy of the foregoing Memorandum in Support of Defendant's Motion to Strike Nonresponsive Deposition Testimony of Dr. Gregory O'Shanick was electronically filed with this Court and hand-delivered to:

Wesley Doyle Payne
an individual represented by
Carlton F. Bennett, Esq. (VSB No. 18453)
C. Stewart Gill, Jr., Esq. (VSB No. 42789)
Bennett & Zydron, P.C.
120 South Lynnhaven Road, Suite 100
Virginia Beach, VA 23452
Phone: (757) 486-5454
Fax: (757) 486-8910

/s/
Robert H. Burger, Esq. (VSB #43893)
WILLIAMS MULLEN, P.C.
222 Central Park Avenue
Suite 1700
Virginia Beach, Virginia 23462-3035
Phone Number: 757.499.8800
Fax Number: 757.473.0395
rburger@williamsmullen.com

1665153v1